IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 121 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KOLIARSHI LILA SIDHPUR TAL.KUTIAYA DIST.JUNAGADH

Versus

STATE OF GUJARAT

Appearance:

MR AJ SHASTRI for Petitioner

MS AMEE YAGNIK APP for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.M.KAPADIA

Date of decision: 06/11/98

ORAL JUDGEMENT (Per J.N. Bhatt, J.):

1. Record of the present case has disclosed and also revealed that on conviction of present appellant/original accused ('the accused' for short hereinafter) under Section 302 of the Indian Penal Code ('IPC' for short hereinafter), he is awarded imprisonment for life by learned Additional Sessions Judge, Porbandar, in Sessions

Case No.14 of 1990, by his impugned judgment and order dated 31.12.1990, which is, essentially, founded upon two circumstances, which, in our opinion, are, totally, unconcerned or insufficient, for proving complicity of the accused for the charge of murder.

2. On 30.11.1990, charge came to be framed against the accused, at Ex.3, on the ground that he committed murder of one Kasam Ismail, a co-worker, while he was sleeping on the terrace of the office of Amber Metal Industries, situated on the road side, on highway, leading from Chauta to Sidhpur, near city of Kutiyana. The motive ascribed by the prosecution has been that there was quarrel between the deceased and the accused on 16.6.1990 for drinking a cup of tea. On the next day, i.e., 17.6.1990, at midnight, around 12.30, offence of murder is alleged to have been committed. In that, it has been alleged that the accused caused injuries on the head of the deceased with the help of a stone. That is how the accused came to be charged for the offence under Section 302 of IPC.

3. Defence of the accused was of total denial. The accused has stated in his further statement that his master desired him to undertake the responsibility of debt to which he denied as a result of which he came to be dismissed from the services.

4. In order to substantiate and fortify the charge of murder, the prosecution placed reliance on the evidence of ten witnesses and documentary evidence in the nature of reports of Forensic Science Laboratory, complaint and post mortem report. Upon appreciation and evaluation of the evidence, the trial Court found the accused guilty for the offence punishable under Section 302 of IPC and imposed punishment of rigorous imprisonment for life. Hence this appeal under Section 374 of the Criminal Procedure Code ('the Code' for short hereinafter) at the instance of original accused.

5. After having examined, dispassionately, the entire evidence on record and considering the submissions raised before us, we are of the clear opinion that the impugned conviction under Section 302 of IPC and resultant imprisonment for life, is not only vulnerable but, totally, illegal, based on misconception of facts and misappreciation of the fundamental principles of criminal jurisprudence.

6. There is no dispute about the fact that deceased Kasam Ismail, one of the co-workers, working in the stone

crushing factory known as Amber Metal Industries, died a homicide death, as per the medical evidence of Dr. H.R. Patel, P.W.1, at Ex.13, who had conducted autopsy. According to the medical evidence, there were four cut wounds on the left portion of the face of the deceased due to which there was congestion of brain tissues and it resulted into death. We are not happy the way in which the medical evidence is recorded in the trial Court. Be it as it may. According to the evidence of Dr. Patel, who had prepared the post mortem report, deceased Kasam Ismail died a homicide death. Cause of death, according to the evidence of Dr. Patel, was cardiorespiratory failure due to hemorrhage and shock. Incidentally, it may be mentioned that Dr. Patel has admitted in the cross-examination that the injuries sustained by the deceased and noticed by him in the course of post mortem examination were not possible by a fall on a hard and solid substance. He has also not stated in his evidence as to how the injuries sustained by the deceased were possible. His evidence, at Ex.13, and the post mortem report, at Ex.7, however, clearly indicate that the deceased died a homicidal death.

7. It may also be noted at this stage that this is a case of circumstantial evidence. It is an admitted fact that there was no direct evidence to connect the accused with the complicity charged against him. Before we consider the two circumstances relied on by the trial Court to base conviction under Section 302 of IPC, let us have highlights of evidence led by the prosecution in support of the charge against the accused.

8. We have already discussed the evidence of P.W.1, Dr. H.R. Patel, at Ex.13. P.W.2, Rambhai Nebha, is the Manager of Amber Metal Industries, who has no personal knowledge about the main incidence. He is examined at Ex.15. In his evidence he has stated that the accused and the deceased were working as labourers in Amber Metal Industries. The accused was also working as Watchman and he was also doing, partly, work of preparing tea and food in a pantry of the company. Evidence of the Manager Mr. Rambhai Nebha, does not throw any light about the incidence. P.W.3, Savdas Karsan, who is examined at Ex.17, was working as a contractor for drilling work in the company and deceased Karsan Ismail was working as his labourer. He had also engaged the accused through one Manchharam. It is very clear from his evidence that he was working as a tractor driver. From his cross-examination it is clear that he was one of the persons sleeping on the terrace on the unfateful night. There were four to five persons who were sleeping on the

terrace and in the room near the terrace on that night. His evidence does not enlighten about the main incidence. P.W.4, Manchharam Ranchhoddas, is examined at Ex.18. He was also working as a driver. He has also no personal knowledge about the main incidence. However, one thing is noticed from his evidence that there was a quarrel between the deceased and the accused on account of preparation and taking of tea. Hie evidence, therefore, does not throw any light on the main incidence. P.W.5, Ramde Audhak, is also one of the co-workers and he is examined at Ex.19. He is also unable to corroborate the prosecution case on the main theme. Of course, he says that there was a quarrel between the accused and the deceased. Therefore, his evidence does not take the prosecution case any further. So is the position in case of P.W.6, Maganbhai Muljibhai, at Ex.20, and P.W.7, Ramnik Bachubharti, at Ex.21. Both these persons are panch witnesses and they have turned hostile to the prosecution case. P.W.8, Menand Natha, examined at Ex.22, has also turned hostile. The complaint came to be recorded by P.W.9, Police Station Officer, Shahsursinh Pannasinh, who is examined at Ex.23. He had recorded the complaint as narrated by the complainant, Rambhai Nabha, on 18.6.1990, at about 8 A.M. when he was on duty in Police Station, at Kutiyana. The complaint is produced at Ex.16. The complaint is lodged upon suspicion.

9. The investigating officer, P.W.10, Chandrakant Nanalal Mehta, who was working as Police Sub Inspector, is examined at Ex.24. The offence came to be registered with C.R.No.51/90 and Police Sub Inspector Mr. Mehta was informed about the offence of murder when he was in the office of the District Superintendent of Police on 18.6.1990 at about 11 A.M. He started investigation and recorded statements of witnesses. He arrested the accused on 9.7.1990 when he appeared before the police on his own. Clothes of the accused put on at the time of the alleged offence came to be recovered by the accused as per the evidence of Police Sub Inspector Mr. Mehta. The discovery panchnama of the clothes of the accused is not exhibited but is given mark 5/7. The investigating officer Mr. Mehta has identified signatures of the panchas who have turned hostile. Clothes of the accused, mentioned at Sr.Nos. 7 to 11 in the Articles, came to be collected and forwarded to the Director of Forensic Science Laboratory for analysis and report. Upon completion of the investigation, charge-sheet followed against the accused and thereafter the case being committed, accused came to be tried for the offence punishable under Section 302 of IPC in Sessions Case No. 14 of 1990 in which he is found guilty for the same.

Hence this appeal.

10. Prosecution can establish culpability of the accused by direct evidence or by circumstantial evidence. This is a case of circumstantial evidence. The learned trial Court Judge has founded conviction upon following two circumstances as manifested in para 26 of his impugned judgment:

(i) quarrel between the deceased and the accused, and
(ii) deceased and accused were sleeping on a terrace on the unfateful night and in the early morning on the next day, witness Saudas found the accused missing.

Thus, the culpability of the accused for a serious offence of murder punishable under Section 302 of IPC is based only on the aforesaid two circumstances. It cannot be conceived, even for a moment, while bearing in mind the celebrated principles of criminal jurisprudence to which we are wedded, the aforesaid two circumstances, even remotely, connect the accused with the complicity charged against him for the murder of deceased Kasam Ismail. Previous dispute or a quarrel between the parties for a petty thing and absence of the accused on the terrace on the next day morning, are the two circumstances found against the accused. How could these two circumstances connect the accused with the complicity of murder of deceased Kasam Ismail? On terrace and in the room on the terrace the deceased, accused, prosecution witness Saudas and two to three other persons were sleeping. We have not been able to comprehend how these two circumstances could even, remotely, indicate the complicity of the accused for the murder of the deceased.

11. In our opinion, the trial Court has wrongly assumed following aspects upon the aforesaid two circumstances; (i) that the accused committed murder of deceased with the help of a stone and (ii) on account of previous enmity and quarrel between the accused and the deceased, it was the accused and nobody else committed the murder, and it is proved beyond reasonable doubt.

12. With due respect to the learned trial Court Judge, the premises upon which the inferences and the conjectures are made, are, totally, not only unsustainable but even non-cognizable to transfix the rigorous of the complicity of the accused for the murder of deceased Kasam Ismail.

13. In fact, it is settled proposition of law that in order to base conviction on the basis of the circumstances, there ought to be a complete chain to, unequivocally, point out the complicity of the accused. The entire circumstantial evidence should be, totally, incompatible and inconsistent with the innocence of the accused. There should not be any missing link. The chain so established from the evidence of the prosecution must, unerringly, point out the complicity of the accused. In case of any missing link with which a reasonable doubt is conceived, the benefit of it must go to the accused. This celebrated fundamental principles of circumstantial evidence cannot be lost sight of while appreciating the merits of the prosecution version based upon the circumstances until the Court reaches to a conclusion that the link of the circumstantial evidence is so complete that there is not even a hypothesis of innocence of the accused and it indicates his complicity only. In our opinion, this principle of appreciation of circumstantial evidence has not been, properly, put in the focus before the learned trial Court Judge. The only and only two circumstances which have been relied on by the trial Court, for basing conviction in a serious charge of murder against the accused, are not at all not sufficient, but even not indicative of the guilt of the accused, remotely. Therefore, the impugned conviction of the appellant/original accused for the offence punishable under Section 302 of IPC and resultant imprisonment for life requires to be quashed and set aside. It is noticed from the record that the accused has remained in jail as an under trial prisoner almost for a period of one year and came to be released on bail after the filing of this appeal. Second thing which we have noticed is about the misconception of processus justice. The alleged discovery panchnama, as we have observed hereinabove, is not given exhibit number for the reasons not known to us, being absent on record. However, apart from the evidence of two panchas, P.W.6, Maganbhai Muljibhai (Ex.20) and P.W.7, Ramnik Bachubharti (Ex.21), who have turned hostile but have admitted their signatures in the discovery panchnama, P.W.10, Police Sub Inspector, Chandrakant Nanalal Mehta (Ex.24), has clearly testified that the panchas had signed in his presence and he has identified their signatures. The panchnama is not held to be proved and has not been exhibited. We have not been able to comprehend as to why the trial Court has adopted this course. When a document, even if a signature on a document, is admitted or established by other evidence, has to be given exhibit number as it could be considered to that extent, for a limited purpose, regardless of the evidentiary value thereof.

What evidentiary value it may have or what weight should attach to such a document will be a different issue. But at the same time, it cannot be disputed that it has to be given exhibit number. What prompted the trial Court in not considering these aspects has remained in wilderness. However, in view of the evidence of two panch witnesses who have turned hostile but have admitted their signatures in the discovery panchnama produced at mark 5/7 and in view of the evidence of P.W.10, Police Sub Inspector - Investigating Officer- Mr. Mehta, who is examined at Ex.24, the discovery panchnama ought to have been given exhibit number and ought to have been considered. No doubt, the two panch witnesses have turned hostile. But they have admitted their signatures in the panchnama. It is always open for the Court, in a given set of facts, to place reliance on such a document. This aspect, unfortunately, in our opinion, has also remained in oblivious while impugned judgment came to be recorded. Although in exercise of our appellate powers we could exhibit it, since we have, unhesitatingly, successfully, noticed that this is a case of, practically, 'no evidence', we do not propose to resort to that exercise in this appeal. With these observations, we propose to pass following order:

14. The appeal is allowed. The impugned conviction judgment and resultant order of sentence for life imprisonment has been quashed. Amount of fine, if paid, shall be refunded upon due verification by the trial Court. Since the accused has already been released on bail in the course of the appeal, no further order is warranted for his release since he has earned clear and clean acquittal, on merits. However, the bail bonds shall stand cancelled and sureties shall stand discharged.

(karan)